INDEX

CITATIONS

450-789—71——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-69

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE JOSEPH ORITO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion and order of the district court (App. 5-9) is unreported.

JURISDICTION

On October 28, 1970, the United States District Court for the Eastern District of Wisconsin entered an order (App. 5-9) dismissing a one-count indictment against appellee which charged the transportation of obscene material by means of a common carrier in violation of 18 U.S.C. 1462. The court's ruling was based on its view that Section 1462 was unconstitutionally overbroad because it barred the transportation of obscene materials which are intended for pri-

vate use (App. 9). A notice of appeal to this Court under 18 U.S.C. 3731 was filed in the district court on October 29, 1970 (App. 10). Probable jurisdiction was noted by this Court on October 12, 1971 (App. 11). This Court has jurisdiction under 18 U.S.C. (1964 ed.) 3731 to review on direct appeal a district court dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See *e.g., United States* v. *Spector,* 343 U.S. 169; *United States* v. *Petrillo,* 332 U.S. 1.[1]

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material, can constitutionally be applied where the transportation is for personal use.

2. Whether, assuming *arguendo* that transportation of obscenity for personal use may not be prohibited, the district court erred by considering and sustaining a challenge to the statute on its face.

STATUTE INVOLVED

18 U.S.C. 1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

[1] The recent amendment to 18 U.S.C. 3731, providing for government appeal to the courts of appeals in circumstances such as this, applies only to cases begun in the district courts after January 2, 1971.

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

In a one-court indictment filed in the United States District Court for the Eastern District of Wisconsin, appellee was charged with having knowingly transported in interstate commerce, by means of a common carrier, various specified copies of obscene materials, in violation of 18 U.S.C. 1462 (App. 1–2). The indictment charged the transportation of over 80 reels of film, many of which are duplicates. Appellee filed two motions to dismiss the indictment on the ground that the statute was unconstitutional. One motion was based on the absence of a provision in the statute requiring proof of *scienter*. The other motion was based on the contention that the statute was overbroad because it reaches the interstate transportation of obscene materials for solely personal use in violation of the First and Ninth Amendments (App. 3–4).

Relying primarily upon this Court's decisions in *Stanley* v. *Georgia*, 394 U.S. 557, and *Redrup* v. *New York*, 386 U.S. 767, the district court dismissed the indictment (App. 5–9). The court reasoned that those

cases, and certain other lower court decisions (*e.g. United States* v. *Lethe,* 312 F. Supp. 421 (E.D. Cal.)), established that the government's interest in controlling the distribution or possession of obscenity was limited to preventing "pandering * * * or its exposure to children or to unwilling adults" (App. 9). Since, however, Section 1462 prohibits transportation irrespective of its intended purpose and thus reaches transportation for personal use, the court ruled that the statute was unconstitutional on its face (*ibid.*). The court did not consider the *scienter* issue.

SUMMARY OF ARGUMENT

I

The court below proceeded on the assumption that since *Stanley* v. *Georgia,* 394 U.S. 557, protected the right to possess obscene material in the privacy of one's own home, there was also a constitutionally protected right to obtain it. On this theory it found 18 U.S.C. 1462 facially unconstitutional since the statute reached material transported by a common carrier for personal use. This view misconceives the thrust of *Stanley,* in overlooking the holding of *Roth* v. *United States,* 354 U.S. 476, and its progeny that obscenity is not protected by the First Amendment. It is also contrary to the recent decisions in *United States* v. *Reidel,* 402 U.S. 351, and *United States* v. *Thirty-Seven* (*37*) *Photographs,* 402 U.S. 363, which reaffirmed the established proposition that there is no right to purchase obscene material.

Stanley does not protect the transportation of obscene material. That decision rested upon the right of the individual to be free from government intrusion into his home and private thoughts even when he is in possession of obscenity. It did not grant First Amendment protection to obscene material *per se* or create a zone of privacy to protect that material in transit because it is allegedly being transported for private use. The crucial distinction between the individual's rights to privacy in his home and library, and the privacy of obscene material in locations outside his personal abode, whether it be a common carrier or a port of entry, was expressly recognized in *Reidel* and *Thirty-Seven (37) Photographs*. Both cases held that in the latter contexts no rights of privacy like those in the home obtain, but rather that in those contexts obscenity is subject to governmental control. In short, whatever the intended use of the obscene material, the material itself is not constitutionally protected from governmental seizure or prosecution as it proceeds to its intended location. The district court thus erred in holding 18 U.S.C. 1462 unconstitutional.

Any other rule might impair the interests protected by governmental control of commercial transportation of obscene material. Protecting transportation for personal use from governmental control might result in the intrusion of the obscene material upon an unwilling recipient by inadvertent exposure through a misdelivered shipment or other accident. Moreover, it would often be very difficult to distinguish between materials shipped for private use and those

480-789—71——2

shipped for commercial exploitation. To allow the issue to turn upon the claim of the shipper would chance the real danger of rewarding those who, despite their protestations to the contrary, in fact plan commercial distribution. The prohibition of transportation for private use is thus necessary to render the bar against commercial distribution effective. Moreover, such control is consistent with this Court's decisions; it does not restrict protected speech nor does it interfere significantly with rights of privacy.

II

In any event, the district court acted improperly in striking down the statute as invalid on its face. Even if it cannot constitutionally be applied to transportation for private use, it is clearly constitutional as applied to transportation for commercial purposes, and, as *Thirty-Seven (37) Photographs* holds, the possibility of overbreadth in reaching transportation for private use would not make the statute invalid in all its applications. Those who transport for commercial purposes need not be afforded standing to raise the rights of those who transport for private use, since this is not a case where there is a danger of vagueness and "chilling effect." See, *e.g. Dombrowski v. Pfister,* 380 U.S. 479. If the statute is overbroad, that overbreadth can be simply cured, probably in a single criminal prosecution, since there is a clear conceptual line between commercial distribution and transportation for private use. Whatever the rule as to the latter, the former type of distribution is clear-

ly subject to governmental control. Thus, assuming that transportation for private use is protected, whether the statute may be validly applied to appellee would depend on whether it was determined at trial that his purpose was commercial or private. There was no reason in these circumstances for the court to move prematurely and strike down the entire statute.

ARGUMENT

I

CONGRESS HAS THE POWER, WHICH IT EXERCISED IN 18 U.S.C. 1462, TO PROHIBIT THE INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL REGARDLESS OF ITS INTENDED USE.

Relying upon a broad interpretation of *Stanley* v. *Georgia*, 394 U.S. 557—that the right to read obscene materials in the privacy of one's own home implies the right to receive such materials—the district court struck down the statute involved here because it could be applied to bar transportation of obscene materials for personal use.[2] The court could "find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes" (App. 8). There are, however, dispositive distinctions between the two activities, many of which were expli-

[2] Presently before the Court is the related question whether Congress has the power to prohibit importation of obscene matter for private use. See *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film, et al.*, No. 70-2, probable jurisdiction noted June 21, 1971, 403 U.S. 930.

cated by this Court in *United States* v. *Reidel*, 402 U.S. 351, and *United States* v. *Thirty-Seven* (*37*) *Photographs*, 402 U.S. 363, both decided after the district court's decision in this case. These distinctions justify reversal here and the sustaining of the constitutionality of the statute.

A. In *Reidel*, this Court held that Congress may constitutionally preclude the use of the mails for the distribution of obscene material even to willing recipients who state that they are adults. In *Thirty-Seven* (*37*) *Photographs*, the Court sustained the power of the government to prohibit the commercial importation of pornography into this country. These decisions confirmed the import of numerous earlier decisions, *e.g.*, *Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises* v. *Day*, 370 U.S. 478; *Ginzburg* v. *United States*, 383 U.S. 463, that there is no constitutional right to purchase obscene material. As this Court stated in *Reidel*, 402 U.S. at 354: "Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned." And again "*Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today." *Id.* at 356. In *Thirty-Seven* (*37*) *Photographs*, the Court pointed out that in *Reidel* it had held "that Congress may constitutionally prevent the mails from being used for distributing pornography" (402 U.S. at 376). In short, both decisions recognized and reaffirmed the central principle of *Roth* that "obscenity is not within the area of constitutionally protected speech or press" 354 U.S. at 485.

Reidel and *Thirty-Seven* (*37*) *Photographs* make plain that there is no First Amendment right to sell or purchase obscene material, nor any right to distribute obscenity. Thus there can be no doubt that Section 1462 is constitutional to the extent that it reaches the interstate transportation by a common carrier of obscene material intended for commercial distribution.[3] The lower court here has acknowledged as much (App. 9). We submit that it is equally plain that the statute is constitutional as applied to transportation for private purposes. The contrary view adopted below rests essentially upon an overly broad reading of *Stanley* v. *Georgia*—a reading rejected both by *Reidel and Thirty-Seven* (*37*) *Photographs*.

B. In *Stanley* v. *Georgia*, 394 U.S. 557, state agents entered the home of Mr. Stanley under a search warrant which authorized them to seize evidence of bookmaking. In the course of the search, they discovered a roll of motion-picture film and a projector. They viewed the film, concluded that it was obscene, and arrested Stanley. He was convicted under state law for "knowingly hav[ing] possession of * * *

---

[3] Several lower federal courts have upheld the constitutionality of 18 U.S.C. 1462. See *Miller* v. *United States*, 431 F. 2d 655, 657 (C.A. 9), pending on a petition for a writ of certiorari, No. 70-43, this Term (constitutional, as applied to commercial distribution); *United States* v. *Fragus*, 422 F. 2d 1244 (C.A. 5) (constitutional, without reference to purpose of transportation); *United States* v. *Melvin*, 419 F. 2d 136, 139 (same); United States v. *Thevis*, 320 F. Supp. 713, 715 (N.D. Ga.) (statute is constitutionally valid in the context of commercial distribution). See also *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D. D.C.), affirmed, 390 U.S. 457 (sustaining the venue provisions of 18 U.S.C. 1461 and 18 U.S.C. 1462).

obscene matter." *Stanley* v. *Georgia, supra,* 394 U.S. at 558. This Court reversed, holding that the "First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. at 568. As we pointed out in the Brief for the United States in *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film, et al.*, No. 70–2, this Term, pp. 8–11, we view *Stanley* essentially as vindicating the right of personal privacy in the confines of one's home and not as protecting the materials possessed or granting a right to obtain such materials. The decision was thus grounded on a combination of the Fourth Amendment proscription of "unwanted governmental intrusions into one's privacy" (*id.* at 564) and the First Amendment prohibition of governmental "control [over] the moral content of a person's thoughts" (*id.* at 565). The power of the government to regulate obscenity "does not extend," the Court concluded in *Stanley*, "to mere possession [of obscenity] by the individual in the privacy of his own home" (*id.* at 568). The focus of the decision was on "the right [of an individual] to satisfy his intellectual and emotional needs in the privacy of his own home" and "the right to be free from state inquiry into the contents of his library." *Stanley* v. *Georgia, supra,* 394 U.S. at 565. Quoting Mr. Justice Brandeis' language about "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 478), the Court in *Stanley* noted

that "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia, supra,* 394 U.S. at 564. The central thought of *Stanley* is that the values protected by the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights (cf. *Griswold* v. *Connecticut,* 381 U.S. 479), would be endangered by the necessarily intrusive inquiry required to determine whether the contents of a man's library included obscene material.

To be sure, *Stanley* refers to a "right to receive information and ideas, regardless of their social worth" (394 U.S. 564). But in the context of that case, that meant only that the homeowner had a right to receive obscene material in his own home without subjecting his home to a search and without subjecting himself to prosecution for such possession. It did not mean that material outside the home is protected simply because the alleged purpose is to bring it into the home for private use.

Both *Reidel* and *Thirty-Seven* (*37*) *Photographs* have recognized this crucial distinction. In *Reidel* the Court noted the irrelevancy of *Stanley* to those "who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home." (402 U.S. at 355).[4] In *Thirty-Seven* (*37*) *Photo-*

[4] In his concurring opinion in *Reidel*, Mr. Justice Harlan stated in this regard (402 U.S. at 359–360): "* * * the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing upon the privacy

graphs, the plurality opinion of Mr. Justice White pointed out that "a port of entry is not a traveler's home" and *Stanley* does not "extend to one seeking to import obscene materials from abroad, whether for private use or public distribution" (402 U.S. at 376). What these decisions underscore is that the right upheld in *Stanley* to be free from governmental interference with the possession of obscenity in the home does not create a right to override governmental power in order to obtain obscene material. As far as obscene material is concerned, the rights one enjoys in the home are not the same as those enjoyed elsewhere.

C. As the foregoing discussion has shown, the most recent decisions of this Court construing *Stanley* have recognized what is implicit in that decision itself—that the right of privacy that decision protects does not include the right to obtain obscene material to satisfy a private interest. Accordingly there is no constitutional right to transport obscene material even for a private use and Section 1462 is therefore constitutional as applied to such transportation of obscenity. Just as "a port of entry is not a traveler's home" (*Thirty-Seven (37) Photographs, supra* 402 at 376), neither is a common carrier employed to transport obscene material a zone of privacy protected by the First Amendment. *Stanley* did not purport to deal with the congressional power to regulate the interstate transportation of obscene material by a common car-

---

of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life' be it rich or sordid."

rier. See *United States* v. *Melvin, supra,* 419 F. 2d at 139.

We, of course, recognize that the surrender of property to a common carrier does not forfeit the individual's right of privacy in that property. See, *e.g., Corngold* v. *United States,* 367 F. 2d 1, 7 (C.A. 9).[5] But that privacy is not comparable to the interests protected by *Stanley.* A common carrier is not a private enclave where one enjoys the right to be let alone. Prosecution for possession of obscene material intended for personal use, which is being transported by common carrier, thus does not raise the specter of a gross intrusion into the privacy of a man's home and his library which is at the core of *Stanley.*[6]

---

[5] The privacy of materials being transported by common carrier is not absolute and certainly not as inclusive as the right attaching to materials possessed in the home since the tariffs of most common carriers (if not all) include a right of inspection.

[6] In *Redmond* v. *United States,* 384 U.S. 264, we informed this Court that, in cases involving the sending of obscene materials through the mails (18 U.S.C. 1461), it is not the policy of the government, absent aggravating circumstances such as the defendant being a repeat offender, to institute prosecution when purely private correspondence (in that case a husband and wife, mailing to each other films of themselves in the nude) is involved. This, however, was not a concession of constitutional magnitude. We note, moreover, in this respect that appellee has been convicted in the Central District of California of a similar violation involving a bulk shipment of obscenity where the proof clearly indicated that the material was intended for public distribution. See No. 313, *George Joseph Orito* v. *United States,* O.T. 1970, certiorari denied, 402 U.S. 987. The facts, with respect to the public or private nature of the instant shipment, have not yet been developed in the district court.

Congress has long exercised the power to exclude noxious articles from the channels of commerce (see, *e.g.*, *Ex parte Jackson*, 96 U.S. 727; *Hoke* v. *United States*, 227 U.S. 308). As both *Reidel* and *Thirty-Seven* (*37*) *Photographs* make clear, nothing in *Stanley* suggests that this power may not be used to bar obscene materials, which are concededly outside the protection of the First Amendment, even though those materials are intended for purely personal use. What this Court said in *Thirty-Seven* (*37*) *Photographs* has application here: "That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce." 402 U.S. at 376. By the same token, interstate transportation of obscene material is not constitutionally immune from prosecution simply because the purpose may be to transport it to a home for personal use.

It is further important to note that excluding such material, irrespective of its intended use, from the channels of commerce decreases the risk that such material will intrude on the sensibilities of an unwilling recipient—for example, a traveler picking up the wrong bag, a person receiving a misdelivered package, or those near a shipment that breaks open.[7]

[7] Such an intrusion upon the sensibilities of another might also occur during inspection of a package. Cf. *Rowan* v. *Post Office*, 397 U.S. 728, in which this Court concluded that a householder could refuse to receive material that he considered to be obscene. We also note that prohibiting the interstate transportation of obscene material, which is solely intended for private

Even the court below recognized that the government has a "substantial and valid interest" to prevent the exposure of obscene materials to children and non-consenting adults (App. 9).

There is a related reason to uphold the statute as it applies to transportation for personal use. It is frequently extremely difficult to differentiate between what is intended for private and public dissemination. The same material can be used to serve either purpose. A small quantity of obscene material may very well be reproduced in sufficient quantity for commercial distribution. Nor should resolution of the issue turn on whether a claim is made of private use. For this could reward those who plan commercial distribution, but are disingenuous enough to say material is for private use and clever enough to transport it in a manner that makes the claim plausible. The upshot could be serious interference with the application of the statute to the concededly valid area of transportation for a commercial purpose. See Brief for the United States in *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film*, No. 70–2, this Term, pp. 15–18.

In sum, as *Reidel and Thirty-Seven (37) Photographs* have made clear, obscenity is outside the protection of the First Amendment, and the need for privacy in the confines of one's home which persuaded the Court

---

use, by common carrier will not prevent all interstate transportation of such material. Thus, it remains possible to transport such material by private vehicle. 18 U.S.C. 1465, which prohibits interstate transportation of obscene material irrespective of the mode of transportation used, applies only to transportation for the purpose of "sale or distribution."

in *Stanley* v. *Georgia, supra,* does not carry beyond the portals of that private enclave. It is our submission therefore that the district court erred in dismissing the indictment on the ground that Congress may not prohibit under 18 U.S.C. 1462 the interstate transportation by common carrier of obscene material intended for private use.

II

THE DISTRICT COURT ERRED IN DECLARING THE STATUTE UNCONSTITUTIONAL ON ITS FACE

The district court declared the statute unconstitutional in all its applications on the ground that it was overbroad in reaching transportation for personal use. In *Thirty-Seven (37) Photographs,* this Court rejected a virtually identical attack on the statute forbidding importation of obscene materials. 402 U.S. at 375 n. 3 (plurality opinion of White, J.), 377–378 (concurring opinion of Harlan, J.), 378–379 (concurring opinion of Stewart, J.). Even assuming *arguendo* that the statute is invalid as applied to private transportation, or some forms of private transportation, persons transporting obscenity for commercial purposes may not assert those rights in behalf of their own, quite different activities.

We recognize that when First Amendment freedoms have been involved, this Court has relaxed to some extent traditional rules of standing (see, *e.g., United States* v. *Raines,* 362 U.S. 17, 21), and has "allowed attacks on overly broad statutes with no requirement that the person making the attack dem-

onstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98. The reason for this relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise of First Amendment rights. Permitting individuals to attack such a statute, irrespective of its application to their particular activity, is a means of lessening the prospect that persons whose activity is constitutionally protected will refrain from exercising their rights for fear of criminal sanction. See *Thornhill* v. *Alabama, supra,* 310 U.S. at 97–98; *Dombrowski* v. *Pfister, supra,* 380 U.S. at 486–487. But these concerns have relevancy in the situation where the proper construction of the statute can be determined only after a series of criminal prosecutions. "[T]hose affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others" *Dombrowski* v. *Pfister,* 380 U.S. 479, 491. This piecemeal construction results when the statute is both vague and overbroad. See, *e.g., Thornhill* v. *Alabama, supra; Dombrowski* v. *Pfister, supra.* It is only in that circumstance where "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution" (*Dombrowski* v. *Pfister, supra,* at 491), that one whose conduct might be validly proscribed

under a narrow interpretation may challenge the statute as unconstitutional on its face. See, *e.g.*, *Dombrowski* v. *Pfister*, *supra*, 380 U.S. at 490–492; *Baggett* v. *Bullitt*, 377 U.S. 360, 378. That is not the case here. The present statute is clearly not unconstitutionally vague in its designation of what materials may not be transported. That issue was settled by *Roth*, where this Court held the term "obscene" to be not impermissibly vague. *Roth* v. *United States*, *supra*, 354 U.S. at 491–492. Hence, even if it were unconstitutionally overbroad because it reaches transportation for private use, the instant statute is susceptible of being clearly limited to constitutional applications, probably in a single case. See *United States* v. *Thirty-Seven* (*37*) *Photographs*, *supra*, 402 U.S. at 375, n. 3; *id.* at 377–378 (Harlan, J., concurring); *id.* at 379 n. 1 (Stewart, J., concurring). Cf. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 858–860, 862–863, 908–910 (1970).

Irrespective of the constitutionality of Section 1462 as applied to transportation for private use, it is clear that the government may validly prohibit transportation of obscenity for commercial purposes. The decisions last term in *Reidel*, *supra*, and *Thirty-Seven* (*37*) *Photographs*, *supra*, merely reaffirmed the thrust of earlier cases, recognizing that principle. Indeed, in *Stanley* v. *Georgia*, *supra*, 394 U.S. at 568, itself, this Court explicitly stated that "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend

to mere possession by the individual in the privacy of his own home."

The distinction between transportation of obscenity for commercial purposes and that for personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute. See *United States* v. *Thirty-Seven (37) Photographs, supra,* 402 U.S. at 377 (concurring opinion of Mr. Justice Harlan). There is consequently no reason to permit one engaged in commercial transportation, activity which is the "sort of 'hardcore' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister, supra,* 380 U.S. at 491–492, to escape application of the statute to him by challenging the validity of its possible application to other situations.

In this case the district court, even if it correctly believed that as applied to transportation for personal use the statute was unconstitutional, could have eliminated any overbreadth without the need to strike down the statute by restricting its application to transportation for commercial purposes, and the nature of petitioner's transportation could have been ascertained at trial.[8] Instead of declaring the entire statute unconstitutional, the court should have determined whether the statute could be validly applied to the

[8] Since the indictment charges appellee with having transported a large number of obscene films, many of which were duplicates (App. 1–2), there appears a fair likelihood that transportation was not for personal use.

type of transportation appellee was engaged in.[9] Cf. *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191, 196–197 (S.D.N.Y.), probable jurisdiction noted, 402 U.S. 971, dismissed pursuant to Rule 60, 403 U.S. 942.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded with directions to reinstate the indictment.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

ROGER A. PAULEY,
ROBERT E. LINDSAY,
Attorneys.

NOVEMBER 1971.

---

[9] Last term in a very similar case, *United States* v. *B. & H. Distributing Corp., et al.*, 403 U.S. 927, this Court, on June 21, 1971, vacated the judgment and remanded for reconsideration in light of the decisions in *United States* v. *Reidel*, *supra*, and *Thirty-Seven (37) Photographs*, *supra*. In that case, the district court had dismissed an indictment drawn under the statute at issue here on the ground that Section 1462 was unconstitutionally overbroad because it fails to distinguish between transportation which presents danger to minors or the danger of intrusion upon unwilling recipients and transportation which does not present those dangers. 319 F. Supp. 1231, 1236–1237 (W.D. Wis.).

U.S. GOVERNMENT PRINTING OFFICE: 1971